No. 108.

Brief of Wolf for Oct. Term, 1898.

Filed Oct. 31, 1898.

Office Supreme Court U. S.
FILED
OCT 31 1898
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 108.

THE CAPITAL TRACTION COMPANY,

PLAINTIFF IN ERROR,

vs.

CHARLES HOF.

MOTION TO DISMISS AND BRIEF THEREON.

ALEXANDER WOLF,
Attorney for Charles Hof.

BYRON S. ADAMS, PRINTER.

Supreme Court of the United States.

No. 108.

THE CAPITAL TRACTION COMPANY,

PLAINTIFF IN ERROR,

vs.

CHARLES HOF.

MOTION TO DISMISS AND BRIEF THEREON.

ALEXANDER WOLF,
Attorney for Charles Hof.

SUPREME COURT OF THE UNITED STATES.

THE CAPITAL TRACTION COMPANY,
Plaintiff in Error,
vs.
CHARLES HOF.
} No. 108.

Now comes the defendant in error, Charles Hof, and moves this Honorable Court to dismiss the writ of error in the above-entitled cause, and for reasons therefor, states:

First. That this Court is without jurisdiction to hear the said cause.

Second. That the defendant in error, Charles Hof, is not a proper party to the Record, and the writ of certiorari prayed for by plaintiff in error, in the original proceedings, was not addressed to the said Charles Hof, but to Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, who is not a party to this suit.

ALEXANDER WOLF,
Attorney for Defendant in Error.

To R. ROSS PERRY, ESQ.,
Attorney for Plaintiff in Error.

SIR: Please take notice that on Monday, October 10, 1898, at 12 noon, or as soon thereafter as can be heard, the Court's attention will be called to the above motion.

ALEXANDER WOLF,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE CAPITAL TRACTION COMPANY,
Plaintiff in Error,
vs.
CHARLES HOF.

Brief on Motion to Dismiss.

First. The right to appeal this cause is founded on the enactment contained in the Act of March 3, 1865, being a right to regulate appeals from the Supreme Court of the District of Columbia and the Supreme Court of the Territories. The first section of the Act states that no appeal or writ of error shall be allowed unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars ($5,000). The second section of the Act enacts as follows: That the preceding section shall not apply to any case where is involved the validity of any patent, or copyright, or in which is drawn in question the validity of a Treaty or Statute, or an authority exercised under the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute. The plaintiff in error has no right of appeal unless the case comes within the second section of the Act, because the amount involved in this suit is less than the jurisdictional amount mentioned in the first section of the Act. This must therefore be a case in which there is drawn in question, the validity of a Statute or an authority exercised under the United States. Upon examination of the petition in this case, it will be seen that the plaintiff in error complains of the construction placed on sections 1009

to 1016 of the Revised Statutes relating to the District of Columbia, and does not complain of the right of Congress to enact such sections. The petition speaks of the so-called jury trial under the said sections as being conducted in a manner unknown to the Common Law, and on that account being illegal and unconstitutional, as contrary to the Seventh Amendment of the Constitution of the United States. Then the petition proceeds to recite why the jury is not a common law jury, and all of the statements which are set out in the fourth paragraph, page 2 of the Record, endeavoring to show why the said jury trial is not a proper jury within the meaning of the Constitution of the United States, and all of the facts therein stated embrace merely the construction placed on said sections 1009 to 1016 and in no way effect, or attempt to effect, the validity of the sections themselves. According to the decision of the Court of Appeals, the majority of the Court held that the construction as set out in the first paragraph of the petition was erroneous, and that the Statute properly construed gave to the man all the rights he was entitled to in the Constitution of the United States. This Court, of itself, has fully considered the question of when the validity of a Statute is called in question, and the Court said, "The validity of a Statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherwise."

Baltimore and Potomac Railway Co. *vs.* Hopkins, 131 U. S., 210.
See also United States *vs.* Lynch, 137 U. S., 280.

Where the Court held that a denial of the validity of the Statute must be directly and not incidentally called in question, and the consideration of the construction of the Statute itself does not call in question its validity. Where, it might be asked, in this Record is there any question

affirmed on one side and denied on the other side, calling in question the validity of the sections of the Revised Statutes relating to the District of Columbia? The plaintiff in error says it is aggrieved not because Congress had no right to pass the sections in question, but because merely the courts have construed these sections contrary to law, and deprived it of its constitutional rights. It is therefore submitted that the validity of sections 1009 to 1016 of the Revised Statutes relating to the District of Columbia, is not called in question, and that the Court is without jurisdiction to hear this cause on its merits, and of this opinion was the Court of Appeals of the District of Columbia, when after the filing of briefs and argument by counsel, that Court refused to grant the writ of error.

Second. The writ of certiorari issued in this cause was directed to Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, and the prayer of the petition asked that a certain cause pending before said justice be remanded to the Supreme Court of the District of Columbia for trial, and Charles Hof, the defendant in error, appeared by attorney and moved to quash the writ of certiorari so that the cause of action in which he was a party, could be remanded for trial before said Justice of the Peace. The Supreme Court of the District of Columbia refused to quash the writ of certiorari, and Charles Hof was compelled to appeal the case to the Court of Appeals of the District of Columbia, where the Supreme Court of the District of Columbia was reversed and the case remanded to the Court to quash the petition for the writ of certiorari and remand the case to the justice of the peace for trial. It is submitted that Charles Hof was not a proper party to the suit, but that the justice of the peace, the real defendant in the cause, should have been named as defendant; that to grant a writ of error against Charles Hof was incorrect, for it will

be seen by an examination of the Record that Hof is in no way connected with the petition for a writ of certiorari or any of the processes issued thereon.

It is, therefore, respectfully submitted that this Court should not proceed any further with this case, but that the same should be dismissed. It may be contended by counsel for the plaintiff in error that the questions involved in this case are of so grave a nature that this Court should, if possible, hear and determine them.

In reply thereto the defendant in error informs the Court that there is now pending in this Court two cases, at least, in which the Record attacks the validity of sections 1009 to 1016, and not merely their construction.

Respectfully submitted.

ALEXANDER WOLF,
Attorney for Defendant in Error.